IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 8TH JUNE 2007 / 18TH JYAISHTA 1929

WP(C).No. 15545 of 2005(A)

OS.43/2003 of ADDL.M.C.,KOZHIKODE-I

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PETITIONER:

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1. THULADIDAS, THALAPPULLIPALAKKAL,
S/O.MADHAVAN NAIR, AGED 42 YEARS,
RESIDING ADHITHRA, VADAKKMOORKKANAT,
PUTHIYANGADI AMSOM, EDAKKAD DESOM,
KOZHIKODE TALUK.

2. MOHANDAS, S/O.NARAYANAN NAIR,
AGED 37YEARS, RESIDING AT AISHWARYA,
VADAKKEMOORKKANAL, PUTHIYANGADI AMSOM,
EDAKKAD DESOM OF KOZHIKODE TALUK.

3. NARAYANAN NAIR, S/O.MADHAVI AMMA,
AGED 63 YEARS, RESIDING AT AISHWARIYA,
VADAKKEMOORKKANAT, PUTHIYANGADI AMSOM
EDAKKAD DESOM, KOZHIKODE TALUK.

BY ADV. SRI.V.V.SURENDRAN
SRI.P.A.HARISH

RESPONDENTS:

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1. P.RAJAKRISHNANNAIR, S/O.RAGHAVAN NAIR,
RESIDING AT VADAKKE MOORKKANATT HOUSE,
PUTHIYANGADI AMSOM, EDAKKAD DESOM, KOZHIKODE TALUK

2. P.RAJANADHAN NAIR, S/O.RAGHAVAN NAIR,
RESIDING AT VAISHNAVI, PUTHIYANGADI AMSOM,
EDAKKAD DESOM, KOZHIKODE TALUK.

3.BIJU AUGUSTINE, ADVOCATE
KOZHIKODE.

(R3 IS IMPLEADED AS PER THE JUDGEMNT)

BY ADV. SRI.P.SANJAY
SRI.A.PARVATHI MENON

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC NO. 15545/2005

APPENDIX

PETITIONERS EXHIBITS:

EXT.P1: COPY OF THE REPORT FILED BY THE ADVOCATE COMMISSIOENR IN O.S. 43/2003

EXT.P2: COPY OF THE SKETCH FILED BY THE ADVOCATE COMMISSIONER IN O.S. NO. 43/03

EXT.P3: COPY OF THE AFFIDAVIT FILED BY THE PETITIONERS.

EXT.P4: COPY OF THE AFFIDAVIT FILED BY THE FILED BY BY THE PETITIOENRS.

EXT.P5: COPY OF ORDER OF THE LEARNED MUNSIFF IN I.A. 1978/03

EXT.P6: COPY OF THE ORDER OF THE LEARNED MUNSIFF IN I.A. 2166/04

EXT.P7: COPY OF THE PETITION FIELD BY THE PETITIONER.

EXT.P8: COPY OF THE ORDER OF THE LEARNED MUNSIFF IN I.A. 333/05

PIUS C. KURIAKOSE, J.

W.P.(C) NO. 15545 of 2005

Dated this the 8th day of June 2007

JUDGMENT

Sri.Biju Augustine, Advocate, Kozhikode is impleaded suo motu as additional respondent No. 3 in the writ petition. The Registry will carry out corrections in the cause title.

2. In this proceedings under Article 227 of the Constitution, the petitioners defendants impugn Exts.P5, P6, and P8 orders. Ext.P5 order is passed by the learned Munsiff on an application which was filed by the defendants for setting aside the Advocate Commissioner's report (Ext.P1). Ext.P6 is an order subsequently passed by the learned Munsiff on an application filed by the petitioners for permission to examine the Advocate Commissioner and Ext.P8 is on order passed by the learned Munsiff on a petition filed seeking a review of Ext.P6.

3. A reading of the three orders will show that the reason which weighed with the learned Munsiff mainly is non examination of the Advocate Commissioner. The Commission Report was obtained at the instance of the plaintiffs. It is common ground that proper commissioner's report is necessary for resolving the issues in the suit correctly. The petitioners had filed objection to the Commissioner's report. Having filed objection to the Commissioner's report, it was upto petitioners to substantiate those objections by cross examining the Commissioner.

4. Mr.P.A.Harish the learned counsel for the petitioners submits that the learned Munsiff has not at all justified in blaming the petitioners for not examining the Advocate Commissioner. Whatever steps necessary for facilitating the appearance of the commissioner in the court had been taken by the petitioners. Commissioner was present in the court on one or two occasions. It was the duty of the learned Munsiff to have compelled the appearance of the Advocate Commissioner by issuing necessary coercive process if it became necessary.

5. Smt.Parvathi Menon the learned counsel for the plaintiffs submits that because of the delay, the respondent's suit is not disposed of. Though what she submit is correct, I do not think that on the facts of this case, it will be proper to mulet the petitioners with cost for the opportunity which I propose to give them for examining the Advocate Commissioner. Under these circumstances, I dispose of the writ petition issuing the following directions:

i). The Additional 3rd respondent and the Advocate Commissioner Sri.Augustine will be present in the trial court on the very next posting of the suit which comes after the petitioners receive a copy of this judgment. The petitioners will inform the additional 3rd respondent regarding the posting date through a letter against his acknowledgment.

ii). The learned Munsiff will allow the petitioners' counsel to cross examine the additional 3rd respondent on the basis of the contentions raised in Ext.P3 on the same day and once evidence is recorded the learned Munsiff will proceed to take a fresh decision on Ext.P3 application. In order to enable the learned

Munsiff to comply with the above direction Exts.P5, P6, P8 are set aside. The 3rd respondent will be eligible for witness batta for giving evidence.

PIUS C. KURIAKOSE,
JUDGE.

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